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**WEST VIRGINIA EDUCATION
EMPLOYEES GRIEVANCE BOARD**

ARCH A. MOORE, JR.
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JOHN TONEY, JR.

v.

Docket No. 22-87-047-1

LINCOLN COUNTY BOARD OF EDUCATION

DECISION

Grievant, John Toney, Jr., is employed by the Lincoln County Board of Education as a bus operator. In December, 1986, he filed a grievance alleging that he had been required to take a stress test which, because of a misdiagnosis, caused him to lose fifteen days sick leave and ten days pay. A level two hearing was conducted by Superintendent of Schools Harold R. Smith on January 13, 1987, and an appeal was filed with the board of education on February 2, 1987. A level three evidentiary hearing was conducted by the board on February 19 and the decision appealed to level four on March 6, 1987. A level four evidentiary hearing was conducted on March 18, 1987.¹

¹ At the level four hearing the transcript of evidence of the level three hearing was admitted into evidence as a joint exhibit (T. __) and the grievance was submitted to the hearing examiner on that record and the legal argument of counsel for the parties.

State Board of Education Policy 4335 provides that school bus drivers must meet certain certification criteria and be certified as physically fit by a physician. In compliance therewith the school board had physical examinations of bus operators performed at a local clinic but sometime in 1986 the board initiated a requirement that the examination include a stress EKG test, which required a trip to Charleston.²

Grievant is sixty years of age and has driven a school bus in Lincoln County for twenty seven years; he had no history of cardiac problems and had taken two physical examinations per year incident to his employment (T. 12). On August 28, 1986, he underwent a stress test in Charleston administered by Dr. Patricia C. Treharne, who recommended grievant be referred to a cardiologist because of a positive result. Dr. Treharne indicated that grievant was not to engage in active exercise or drive a school bus during the interim. (Joint Exhibit 3).

Grievant was referred to Dr. James Stanton, a cardiologist in Charleston, who ordered a stress thallium test about September 19, 1986. On October 6, 1986, the report from the Charleston Area Medical Center concluded that

² The new policy had been prompted by the death of a relatively young bus driver and the test probably saved one life and made five or six other drivers aware of cardiac problems. Apparently, none of the employees objected to the policy requiring the stress test but to the timing of the test so near the commencement of school. (T. 33).

Normal stress thallium study with no evidence of ischemia or previous infarction. This suggests that the EKG findings represent a "false positive."

Accordingly, by letter dated October 13, 1986, grievant was released by Dr. Stanton to resume his duties as a bus operator; grievant returned to work on October 14, 1986. During the period of August 28 to October 13, 1986, grievant was medically certified to be physically unfit for duty as a bus driver and missed twenty five days work. Although the twenty five days qualified as sick days, because of previous use of sick leave grievant was charged with the fifteen days of remaining sick leave and the remaining ten days were unpaid.³

Counsel for the grievant contends that the problem is of one fundamental fairness, the timing of the stress test in relation to the commencement of the school year and the failure of the school officials to timely inform grievant that it was his responsibility

3

Grievant had been involved in a bus accident and had used 180 days of sick leave at the same time he had drawn Worker's Compensation. Apparently, he could have applied for a medical leave and retained his sick leave. (T. 18).

The board contends that the twenty-five days grievant was off was below the average of other drivers, which was 31.9 days. (T.22).

to obtain the test results.⁴ (T. 5,6).

Counsel for the board contends that school bus drivers must be medically certified as physically fit to drive a school bus and that in accordance with W.Va. Code, 18A-4-10 and 11 the board of education is not responsible for loss of sick or personal leave days for medical causes discovered as a result of a routine examination required by the board.⁵

Unquestionably, the initiation of the policy of the board of education whereby school bus drivers were required to undergo a stress test in addition to the regular physical examination had

⁴ Grievant initially contended that the doctor was the agent of the board of education and the board was therefore responsible for the misdiagnosis. This was ostensibly abandoned at level three.

At least one board member acknowledged that part of the fault was attributable to the timing of the test and the inordinate delay of the doctors. (T. 33). However, this board member, Mr. George Chapman, voted to deny the grievance.

⁵ It is to be noted that W.Va. Code, 18A-4-10 provides that where the cause for leave had its origin prior to the beginning of the employment term, the employee shall be paid for time lost after the start of the employment term. See also, Carl Moten v. Fayette County Board of Education, Docket No. 10-86-303-4.

This type of statute providing for enhanced economic benefits must be liberally construed in favor of the employee. Dillon v. Mingo County Board of Education, 301 S.E.2d 588 (W.Va. 1983). See also, Robert Turner v. McDowell County Board of Education, Docket No. 33-86-049.

a salutary purpose for the safety of school children should be of paramount importance to school officials. Child Protection Group v. Cline, 350 S.E.2d 541 (W.Va. 1986). The test had the additional beneficial effect of saving the life of one driver and providing several other drivers with information critical to their health and from this viewpoint all the parties agree upon the propriety of the test. However, from an equitable concept grievant was deprived of an economic benefit through no fault of his own and the burden created by the circumstances of this grievance should not be borne solely by the grievant.

In addition to the foregoing factual recitation, the following specific findings of fact and conclusions of law are appropriate.

FINDINGS OF FACT

1. Grievant has been employed by the Lincoln County Board of Education as a school bus operator for twenty seven years.

2. Sometime in 1986 the school board initiated a policy whereby school bus operators were to undergo a stress EKG test in addition to the regular physical examinations normally administered. Grievant is sixty years of age and in good physical condition.

3. On August 28, 1986, he was directed to undergo a stress test and was therefore referred to a cardiologist; grievant was directed not to drive a school bus by the doctor.

4. Grievant was removed from his duties as bus operator and after a thallium test had been completed by the cardiologist it was concluded that the initial positive EKG findings of heart disease was a "false positive." It was due to grievant's efforts that the cardiologist certified the results to the school officials on October 13, 1986.

5. Grievant returned to work on October 14, 1986, and as a result of the misdiagnosis and the inordinate delay in obtaining the medical clarification grievant lost twenty five days work between August 28 and October 13, 1986. Fifteen days were charged as sick leave and the remaining ten days were unpaid.

6. The loss of time experienced by grievant was due partially to the timing of the EKG stress test in relation to commencement of the employment term and the failure of school officials to inform grievant that it was his responsibility to obtain the test results. The remainder of the loss was attributable to normal delay generally associated with medical treatment in general.

CONCLUSIONS OF LAW

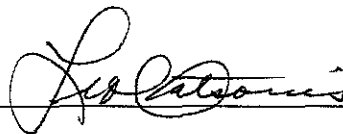
1. W.Va. Code, 18-29-5(b) provides that hearing examiners are authorized to provide such relief as it deemed fair and equitable and as will provide for the effective resolution of grievances.

2. It is an equitable maxim that where one of two innocent parties must suffer because of the derelictions of a third party it is the least culpable of the two innocent parties who should prevail.

3. It was inequitable for the board of education to deplete grievant's sick leave reserve and to deny pay for a twenty five day period of absence from work occasioned through no fault of grievant.

Accordingly the grievance is GRANTED and the board is directed to pay grievant the ten days pay withheld, less any set off, and reinstate the fifteen days sick leave.

Either party may appeal this decision to the Circuit Court of Kanawha County or Lincoln County and such appeal must be filed within thirty days of receipt of this decision. (W.Va. Code, 18-29-7). Please advise this office of your intent to do so in order that the record can be prepared and transmitted to the Court.

A handwritten signature in cursive script, appearing to read "Leo Catsonis", is written over a horizontal line.

LEO CATSONIS

Chief Hearing Examiner

Dated: April 30, 1987